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No. 998

In The

Supreme Court of the United States

OCTOBER TERM, 1964

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL UNION 612

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID PREVIANT
511 Warner Theater Building
Milwaukee, Wisconsin

L. N. D. WELLS, JR.
1601 National Bankers Life Bldg.
Dallas, Texas 75201

Counsel for Petitioner

Of Counsel:

GOLDBERG, PREVIANT & UELMEN
511 Warner Theater Building
Milwaukee 3, Wisconsin

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Bldg.
Dallas, Texas 75201

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on October 2, 1964.

Opinions Below

The Decision and Order of the NLRB issued August 15, 1963, is reported at 143 NLRB 1372, and is printed in Appendix B hereto, *infra*, pp. 1b, ff.

The opinion of the United States Court of Appeals for the Fifth Circuit rendered October 2, 1964,

denying our petition to review the order of the NLRB is reported at 337 F.2d 697, and is printed in Appendix A hereto, *infra*, pp. 1a-5a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 2, 1964. Rehearing was denied December 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and Section 10(e) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §160(e).

Questions Presented

The National Labor Relations Board has held that an employer has no duty to bargain collectively with a union which makes a bargaining demand on behalf of "all drivers" in an employer's fleet, because of the Board's subsequent determination that of the over two hundred and sixty such drivers, approximately twenty are "supervisors." Those found to be "supervisors" are drivers, each of whom owns two to four trucks, all leased to employer. Each drives one truck himself, but participates with employer in the selection of the personnel who drive his other leased trucks. The questions presented are:

1. In these circumstances did the NLRB err in holding that the employer had no duty to bargain collectively with respect to all drivers?

2. Alternatively, did the NLRB err in holding that the employer had no duty to bargain with

respect to the two hundred and forty non-supervisory drivers?

3. Does a variance between the bargaining unit requested by the union and the one ultimately determined to be appropriate (which variance results from a later Board finding that approximately twenty of over two hundred and sixty employees are supervisors) relieve the employer from the duty to bargain collectively?

4. Are these "multiple-owner-drivers" supervisors within the meaning of §2(11) of the Labor Management Relations Act?

Statute Involved

The pertinent provisions of the Labor Management Relations Act of 1947, as amended (61 Stat 136, 29 U.S.C. 151, *et seq.*) particularly §§2(3): 2(11); 7; 8(a) (1); 8(a) (5); 8(d) and 14(a), are printed in Appendix D, *infra,* pp. 1d, ff.

Statement

This case poses another facet of the problems of employee representation and collective bargaining in the transportation industry where most of the trucks are driven by acknowledged "employees," but a growing proportion of the drivers are "owner-operators."

Petitioner (herein "union") had been the

acknowledged collective bargaining representative of all road drivers in the fleet of Deaton Truck Lines, Inc., (herein "Deaton"), for over six years. It had been party to two successive collective bargaining contracts covering all drivers. These included "employees"; "owner-drivers," and "multiple-owner-drivers."

Upon expiration of the current contract, union requested, in writing, that Deaton bargain for a new contract covering "all road drivers in the Deaton operations."[1] Union presented a proposed contract patterned after the then current Southern and Central area collective bargaining agreements to which literally hundreds of employers are parties. The union contract proposal contained an article with respect to "owner-operators" which was the very article before this Court in *Local 24, IBT v. Oliver,* 358 U.S. 283. Compare appendix to *Oliver* opinion, 358 U.S. 283 at 298-304 with union's proposed contract in the instant case, Exhibit GC 20.[2]

Deaton contended that only three of the drivers were "employees,' and that the more than 260 others were "independent contractors," as to whom there was no duty to bargain since §2(3) of the Act excludes from coverage "any individual employed as an independent contractor."

Union charged employer with failure to bargain collectively on behalf of "all road drivers in the

[1]Exhibit GC 19, Joint Appendix, p. 250 at 251. Record (Vol. III), pp. 785ff, at 786.

[2]Deaton's 'Appendix to Petitioner's Brief, p. 120ff at 122-129; Record (Vol. V), pp. 120-148.

Deaton operation" in violation of §8(1) and (5) of the Act.[3] The NLRB trial examiner found that all "owner-drivers" were "independent contractors," but found as to the acknowledged "employees" and "non-owner drivers," that employer had failed to bargain and recommended that an order issue requiring employer to bargain with respect to these drivers. R. 28,ff at 53.[4]

Both union and Deaton filed exceptions. NLRB then issued a Decision and Order, 143 NLRB 1372, finding that *all* who drove in the Deaton fleet were "employees" of Deaton. R. 82ff at 86-90. The Board refused, however, to require Deaton to bargain on behalf of any of the drivers, solely because in the Board's view some twenty of the over two hundred and sixty drivers were "multiple-owner-drivers" i.e., they owned two to four trucks. All of these trucks were leased to Deaton. Each multiple-owner-driver drove one truck himself. The drivers of his other trucks leased to Deaton were jointly selected by Deaton and the multiple-owner-driver. In the Board's view under these facts these multiple-owner-drivers thus become "supervisors," and their inclusion in the contract proposal made by the union so tainted the bargaining demand as to relieve the employer of any duty to bargain on behalf of any of the drivers. Accordingly, the Board found "that

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[3]See Record in consolidated case #20, 791 at pp. 10-11. Record, (Vol. I) pp. 10-11.

[4]Unless otherwise specified the reference "R" is to to the printed record in consolidated case No. 20,791 styled *Deaton Truck Lines, Inc., v. NLRB*, which is included in Volume I of the Record as here certified by the Clerk of the Court of Appeals.

Respondent [Deaton] has not violated Section 8(a)(5) by its refusal to bargain for the unit insisted upon by the Union," (R. 91), and dismissed the complaint. (R. 92).

Thereafter the Board issued a Notice to Show Cause, R. 110-112 which recited:

> "On August 23, 1963, the Union filed a Motion for Rehearing. In its Motion the Union alleged that (1) the employment status of the individuals found by the Board to be supervisors had not been raised by the Respondent as a ground for refusing to come to an agreement, nor was this an issue in the case; (2) the individuals in question are not supervisors; (3) the Respondent must bargain even if the unit sought included some supervisors; (4) the Union may bargain for the alleged supervisors; and. . . ."

and concluded by requiring the parties to show cause why the Board's decision should not be vacated, rehearing granted, and the proceeding remanded for further hearing upon the following issues:

> "1. The supervisory powers, if any, possessed by the multiple owner-drivers;
>
> "2. Whether such drivers constituted a substantial part of the unit which the Union sought to represent;
>
> "3. Whether the Respondent's refusal to bargain was based on the inclusion of such drivers in the requested bargaining unit;"

Four months later, the Board issued an "Order,"

reciting the filing of union's motion for rehearing, the show cause order, and responses thereto, and concluded (R. 152):

> "The Board having duly considered the matter, but being unable to arrive at a majority decision either to grant or to deny the Motion, the Motion fails for lack of a majority."

Both employer and union sought review of the Board's Order; and the petitions to review were consolidated for hearing in the Court of Appeals.

The Court of Appeals rejected employer's petition to review and affirmed the Board's holding that *all* the drivers were "employees" within the meaning of the Act (App. A, *infra*, p. 4a); but concluded, without statement of rationale, that "We are in agreement with the Board's findings upon which it soundly based the conclusion that Deaton was under no duty to bargain with the unit upon which the Union insisted." (App. A, *infra*, p. 5a).

Reasons for Granting the Writ

1.

For at least twenty years the relationship between "employees" and "owner-operators" has presented "a problem thought to threaten the maintenance of the basic wage structure established by [area] collective bargaining contract[s]" in the transportation industry. *Local* 24, *etc. v. Oliver*, 358 U.S. 283 at 294, (1959). It is a matter which "not only clearly bears a close relation to labor's

efforts to improve working conditions but is in fact of vital concern to the carriers' employed drivers." *Ibid.* The same case holds that "certainly bargaining on this subject through their representatives was a right of the employees protected by §7 of the Act." and that ". . . the carriers as employers were under a duty to bargain collectively with the union as to the subject matter of the Article." 358 U.S. at 295.

In the cited *Oliver case,* and in *U. S. v. Drum,* 368 U.S. 370 (1962), this Court has "held that a bargaining unit [as here] including an overwhelming majority of concededly employee drivers of carrier owned equipment was entitled under §8(d) of the National Labor Relations Act, 61 Stat 142. 29 U.S.C. §158(d), to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine whether the owner-drivers were "employees" protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee drivers. . . ." 368 U.S. at 382.

Accordingly, this Court has been zealous to protect the bargaining process with respect to this question from state regulation.[5]

The instant case poses the situation where those

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[5]In *Oliver* this Court stated, 358 U.S. at 296: "We believe that there is no room in this scheme [of federal law of collective bargaining] for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions."

responsible for enforcement of the system of federal law, conceived to adjust just such important questions by collective bargaining, have barred the subject from the bargaining table. The rationale by which such restriction of the bargaining process has been achieved is not spelled out. Neither Board nor Court makes any reference to *Oliver* or *Drum*.

The inability of the Board to find a majority to write either way on rehearing results in wholly removing from the bargaining process those very questions which this Court held in *Oliver* to be subjects as to which the "Federal law . . . created the duty upon the parties to bargain collectively." Indeed, the Board has held, in effect, that the mere existence of the question obliterates the duty to bargain about anything.

As we have shown, union, representing the vast majority of the drivers, sought to bargain for all who drove in the Deaton fleet. Union presented as a bargaining proposal its standard area contract, including in *haec verba* the very Article which was in issue and which this Court appended to its *Oliver* opinion [358 U.S. 283 at 298-304]. The Board and the Court below have held that such bargaining demand "upon a subject matter as to which federal law directs them to bargain" *Oliver*, 358 U.S. at 295, in itself relieves the employer of the Act's requirement that employers bargain.

2.

Oliver entirely aside, the case still presents an important question of labor law as to which there

is conflict in the Circuits. Does an insubstantial variance between the bargaining unit requested by the union and the one ultimately determined to be appropriate relieve the employer's bargaining obligation The Court of Appeals for the District of Columbia says: "No"; and holds, where [as here] the union made a bargaining demand for a unit which the employer had not challenged previously (which unit actually varied from that ultimately found appropriate), that NLRB dismissal of the complaint is "arbitrary." *Brewery Workers v. NLRB,* 103 App. D.C. 190; 257 F.2d 194 (C.A. D.C. 1958). Accord: *Industrial, etc. Union v. NLRB,* 320 F.2d 615 at 617-618 (C.A. 3, 1963).[6]

Yet the Board and the Court of Appeals in the instant case have retreated to a formalism requiring a precision of unit definition in initial bargaining demand which is wholly unrealistic, and denies the very protections which the Act gives.

The District of Columbia Circuit has properly observed in determining the validity of a bargaining request that "the request to bargain [need not] be in *haec verba,* . . . The Labor Management Relations Act is not a statute of frauds or an Act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any special formula or form of words." *Joy Silk Mills v. NLRB,* 185 F.2d 732 at 741 (C.A. D.C., 1950).

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[6]Cf. *Hamilton Plastic Molding Co.,* 135 NLRB 371 (1962); *Sakrete of Northern California,* 140 NLRB 765 (1963); *Great Western Broadcasting,* 139 NLRB 93 (1962).

Normally, bargaining demands are made by laymen to laymen. Precision of definition of the bargaining unit is often difficult even for the sophisticated labor lawyer, or the Board itself. To absolve the employer of the duty to bargain because the quest was on behalf of "all road drivers," less than 10% of whom are two years later found to be "supervisors," is as the cited cases indicate, an arbitrary requirement not authorized by the statute.

3.

Finally, the twenty multiple-owner-drivers are not supervisors within the definition of §2(11) of the Act, (*infra* App. D, p. 1d). Only those "having authority *in the interest of the employer. . .*" are supervisors within this definition.

Assuming that these multi-owner-drivers select, from those qualified by Deaton's examinations, those to be assigned to drive the trucks which they have leased to Deaton, and that they thus "possess . . . the power substantially to effect the hire and discharge of employees . . ." as found by the Board (*infra,* App. B, p. 11b); such authority is exercised in their own interest, and not in Deaton's.

Deaton itself represented to the Court below that "these supervisory acts are not done on Deaton's behalf but in the truck drivers' *own* interest" (Emphasis in original Deaton's brief to Court of Appeals, p. 61-62). Further, Deaton acknowledged in brief to the Court of Appeals:

> "We believe that the Board's finding that the multiple owner-drivers are Deaton's supervisors cannot stand in the absence of any evidence that they act in Deaton's interest, and where both the Union and Deaton are in accord on this fact."

It thus appears that the Court of Appeals has made a finding that the multiple-owner-drivers exercise supervisory authority *in Deaton's interest,* contrary to the quoted admissions in Deaton's brief, and despite the fact that *the Board did not so find.*

The Board's Decision finds only "that the multiple-owner-drivers, possessing the power substantially to effect the hire and discharge of employees, are supervisors within the meaning of the Act" (*infra,* App. B, p. 11b). The Board does not address itself to the question as to whether the supervisory authority is to be exercised *in the interest of Deaton.*

Union's motion for rehearing before the Board was specifically pointed to this deficiency in the Board's findings (R. 93 at 102-104). The Board, evidently recognizing the force of the union's assertion, issued a "Notice to Show Cause" (R. 110-112) "why the aforementioned Decision and Order should not be vacated, a rehearing granted on the issues raised by the union's motion . . ." Deaton responded (R. 112 at 139 stating:

> "The Union's Motion (p. 6-7) adopts Dea-

> ton's contention (Brief to Trial Examiner, p. 81-82) that when hiring and firing, laying off, assigning, directing, etc., the multiple owner-drivers are not acting in the interest of Deaton, but in their own interest. We are emphatically in accord with the Union on this point."

"The Board then considered the Motion for Rehearing and issued an Order which provided; (R. 152):

> "The Board having duly considered the matter, but being unable to arrive at a majority decision either to grant or to deny the Motion, the Motion fails for lack of a majority."

Thus the Board did not ever find that the "supervisory" powers were exercised *in the interest of Deaton.* Its opportunity to make such finding was foreclosed by the failure of the Board to "arrive at a majority."

In the absence of a finding that authority is *"in the interest of the employer,"* these drivers cannot be "supervisors" within the meaning of the Act. Cf. *International, etc., Union v. NLRB,* 339 F.2d 116, at 121-123 (C.A. 2, 1964).

CONCLUSION

The inability of the Board members to agree on the issues here presented underlines the necessity of resolution by this Court of issues recognized in *Oliver* to be of great importance. Moreover, the conflict between the Fifth Circuit on the one hand and the District of Columbia and Third Circuits, on the other, as to the necessity for formally pre-

cise bargaining demands, underlines the necessity of review of the decisions below.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID PREVIANT
511 Warner Theatre Bldg.
Milwaukee 3, Wisconsin

L. N. D. WELLS, JR.
1601 National Bankers Life Bldg.
Dallas, Texas 75201

Counsel for Petitioner

March 17, 1965.

Of Counsel

GOLDBERG, PREVIANT & UELMAN
511 Warner Theatre Bldg.
Milwaukee 3, Wisconsin

MULLINAX, WELLS, MORRIS & MAUZY
1601 National Bankers Life Bldg.
Dallas, Texas 75201

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20791

DEATON TRUCK LINE, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD
Respondent.

No. 21332

TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS, LOCAL UNION 612,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD
Respondent.

Petitions for Review of Orders of the National Labor Relations Board, sitting at Washington, D. C.

(October 2, 1964.)

Before HUTCHESON and RIVES, Circuit Judges, and GROOMS, District Judge.

RIVES, Circuit Judge: The employer, Deaton, and the Union, Teamsters, filed separate petitions

for review of an order of the National Labor Relations Board which dismissed an unfair labor practice complaint against the employer. Deaton does not object to the order dismissing the complaint. Its objections are to certain findings and conclusions upon which that order is based.

The right to review is limited by section 10(f) of the Act, 29 U.S.C.A. 160(f), to "Any person aggrieved by a *final order* of the Board." (Emphasis added.) The same section limits the court's function to "enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order of the Board.*" (Emphasis added.) The court has no jurisdiction of Deaton's petition for review because Deaton is not a party aggrieved by the Board's *order.*[1] The petition for review in No. 20,791 is therefore dismissed.

The Board found that Deaton's refusal to bargain was not violative of section 8(a)(5) of the Act, 29 U.S.C.A. 158(a)(5), because the Union insisted upon the inclusion of some twenty or more multiple truck owner-drivers in the bargaining unit, who the Board held were supervisors within the meaning of the Act, and that Deaton was under no duty to bargain with a unit which included supervisors. Upon such findings and conclusions, the Board dismissed the complaint against Deaton.

The Board stated its reasons for assigning the

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[1] See Federal Power Comm'n v. Hope Natural Gas Co., 1944, 320 U.S. 591, 618, 619; Shannahan v. United States, 1938, 303 U.S. 596, 599; United States v. Los Angeles R.R., 1927, 273 U.S. 299, 309, 310.

status of supervisors to the multiple owner-drivers, as follows:

> "The record clearly establishes that multiple owner-drivers have the power to hire and fire drivers of their trucks. Not only do nonowner drivers in the Deaton fleet have to meet with Deaton's preliminary approval and cannot be hired without such approval, they also have to meet with the approval of, and are, in effect, hired by the owner of the truck. Moreover, the multiple owner-drivers assign drivers to trucks and transfer them from one truck to another without the knowledge and consent of Deaton. They can also fire drivers insofar as driving their trucks is concerned, but in such circumstances the driver remains in the pool and can be selected by another multiple owner-driver, without need of further clearance by Deaton. Under these circumstances we find that the multiple owners-drivers, possessing the power substantially to effect the hire and discharge of employees, are supervisors within the meaning of the Act."

Neither Deaton nor the Union agrees. Deaton contends that all of the owner-lessors are independent contractors and not employees of Deaton.[2] On this contention the Board concluded its discussion as follows:

> "The Board, in conformity with Congres-

[2] While the ruling was favorable to Deaton, Deaton's disagreement with the reasoning is so basic that we think the court should decide the question of such obvious importance to Deaton's labor-management relations. See International Brotherhood, etc. v. Deaton Truck Line, Inc., 5 Cir. 1962, 307 F.2d 748; Deaton Truck Line, Inc. v. Local Union 612, etc., 5 Cir. 1962, 314 F.2d 418; see also NLRB v. Air Control Products, 5 Cir., No. 21017, decided July 28, 1964, ms.

> sional intent, has followed the usual tests of the law of agency and has applied the common law 'righ of control' test. Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end. Consistent with this Congressional mandate, and having in mind the judicial dictate that social legislation be construed 'in the light of the mischief to be corrected and the end to be attained,' we feel compelled to reach a different conclusion from that of the Trial Examiner and find that the drivers, including owner-drivers and multiple owner-drivers, are employees of Deaton.[7] We are satisfied that the degree of control exercised by Deaton over these individuals as shown in part by the collective-bargaining history, is sufficient to support a finding that they are employees of Deaton both in law and as a 'matter of economic reality.' As such they are entitled to the rights guaranteed and protection afforded by the Act.

We agree with that conclusion and with the findings upon which it is based.

The Union argues that the supervisory authority of the multiple owner-drivers over other drivers of

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[7] The Alabama Supreme Court has reached the same conclusion. *Stevens v. Deaton Truck Line, Inc.*, 54 So. 2d 464 (1959); *Deaton Truck Line, Inc. v. Acker*, 74 So. 2d 717 (1954); *Hays v. Deaton Truck Line, Inc.*, 87 So. 2d 825 (1956)."

their trucks is to be exercised in the interest of the multiple owner and not in the interest of the employer, Deaton, as required by the statutory definition of supervisor.[3] The evidence is undisputed that a multiple owner-driver is free to accept or reject any applicant seeking to drive one of its trucks, subject only to the restriction that the applicant be a member in good standing of Deaton's reserved pool of qualified drivers. All drivers handle cargo exclusively for Deaton, in trucks bearing Deaton's name. Granted that the supervisory authority is to be exercised in the interest of the multiple owner, such interest is so intertwined with the interest of Deaton in the successful and efficient operation of the trucks that it cannot be denied in most instances of actual execution the supervisory authority is in the interest of both Deaton and of the multiple owner. We have not overlooked the other contentions of the Union, but find them to be without merit, and see no useful purpose to be served by prolonging this opinion. We are in agreement with the Board's findings upon which it soundly based the conclusion that Deaton was under no duty to bargain with the unit upon which the Union insisted. The petition for review in No. 21,332 is therefore denied.

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[3] "The term 'supervisor' means any individual having authority, *in the interest of the employer*, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C.A. §152 (11). [Emphasis supplied.]

APPENDIX B

D. 5607
143 NLRB No. 124 Birmingham, Ala.

DECISION AND ORDER

(Number and Title Omitted)

On February 4, 1963, Trial Examiner John P. von Rohr issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent and the Charging Party filed exceptions to the Intermediate Report and supporting briefs.

The Board[1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Intermediate Report, exceptions and briefs, and hereby adopts the finding, conclusions and recommendations of

[1]Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

the Trial Examiner only insofar as consistent with our decision herein.

Respondent, herein called Deaton, is an ICC licensed common carrier located in Birmingham, Alabama. It has approximately 263 trucks in its fleet, of which it owns 3 outright, and operates the balance under lease agreements. Of the leased trucks 148 are driven by owner-operators and 112 are operated by nonowner drivers. Three drivers are acknowledged employees of Deaton.

In August 1956, after a 10-week recognition strike Respondent and a "Committee" entered into a "working agreement." The "Committee" was comprised of 1 to 3 lease operators and 2 agents of the Union. Though the agreement was executed only in the name of the "Committee," it contained provisions for continuation of dues checkoff to the Union as well as provisions regarding seniority and wage scales for drivers of company-owned and leased equipment. In May 1957, the Respondent and the Union entered into a more conventional collective-bargaining contract, which expired in 1959, and a later contract which expired in July 1962. Both the 1957 and 1959 contracts contain a section entitled "Recognition and Union Security," which provides that all "Mechanics, Helpers, Drivers, Driver Owners, etc." become members of Local 612 after 30 days' employment, but do not specifically set forth a unit description. These contracts also provide wage scales for yard employees, company drivers and nonowner drivers of leased equipment.

In March 1960, the Company was sold to Sellers, who owns 98-99 per cent of the stock, and who continued to operate under the then current agreement.

On May 11, 1962, the Union notified Respondent by letter that it desired to open the existing agreement and that it would submit a copy of its proposed changes in the near future. At the time, there were 3 suits pending in Federal Courts between Respondent and the Union. Each of these suits involved the question whether the owner-drivers utilized by Deaton were employees or independent contractors. During the negotiations herein, there was no decision in any of these cases regarding the status of the drivers, and indeed no published decision on the merits exists at this time.

Toward the end of June 1962, Deaton's attorney called the Union for the purpose of arranging a meeting to discuss the contract. A meeting was held on June 27, at which time the Union presented no proposals but stated that it would in the near future. Deaton stated that it would not give up the pending cases, nor would it agree to any fundamental change in the status of the drivers, but that it was willing to negotiate pending the outcome of the court cases.

On July 2, 1962, the Union presented its proposals. They were different from those in the existing agreement in that they provided for payment of drivers on a mileage rather than percentage of revenue basis, for payment of separate amounts for driving and truck rental, and that Deaton would clearly make all the drivers its employees. Accord-

ing to Webb, the President and Business Manager of the Union, Sellers characterized the Union's proposal as ridiculous for Sellers' type of operation, and further stated that the only thing Sellers would agree to would be an extension of the current agreement with minor changes, provided the Union stipulated that the owner-drivers were independent businessmen until the courts decided the question.

The Union made no further effort at negotiations and once again Deaton's attorney arranged a meeting with the Union in mid-July.[2] The Employer took the position that it would leave the owner-drivers as they were and bargain on other issues, or make the owner-drivers independent contractors. The Employer also offered to extend the then current agreement. The Union refused to consider making the owner-drivers independent contractors, and would not bargain separately for the drivers who were admittedly employees. The Employer did agree to reduce its position to writing, and the following letter was sent by Sellers to the Union's representative:

> At our meeting today we restated to you our offer heretofore made you in June. That offer was and still is that we are willing to continue operating as in the past. That is, under a contract similar to the one we have operated under for the past three years. We again repeat, as we did in the previous meetings, that we are not willing to change our funda-

[2]The record indicates that this meeting was held on either July 15 or 17, while the Trial Examiner states it was held on July 18.

> mental way of doing business for the purpose of effecting a change in the status of the lessor-owners.
>
> In short, we will continue under the old or a similar contract and under the old or similar leases, and pursuant to our usual method of doing business, pending a final determination in court of the cases which you have brought against us, which, among other things, involve and would result in a determination of the status either as independent contractors or employees of our lessor-owners.

On July 19, 1962, the Employer sent notice of cancellation of its existing leases to the owner-drivers and substituted new leases which would, on their face, make the owner-operators independent contractors.

On July 26, 1962, the parties entered into a "Truce Agreement" which continued the terms and conditions of the last contract, and this agreement was in effect as of the date of the hearing.

The central issue before us, then, is determination of the employment status of individuals who drive in the Deaton fleet. The Trial Examiner found that the owner-drivers are independent contractors and that the multiple owner-drivers, together with Deaton, are employers of the nonowner drivers. We disagree.

The drivers in the Deaton fleet can be classified in four categories: (1) admitted employees who

drive Deaton's trucks; (2) nonowner drivers who drive trucks leased by Deaton; (3) owner-drivers who own a single truck which they drive and lease to Deaton; and (4) multiple owner-drivers who own more than one truck leased to Deaton, and who drive one of their leased vehicles.

Each of these classifications of drivers is subject to the same working conditions, and all were covered by the same collective-bargaining agreements. Deaton's method of operation is such that all drivers are subject to the same degree of direction and control by Deaton. Deaton treats all drivers alike in regard to their day-to-day employment regardless of their nominal status. The truck lease provides that the lessor can transport for no one else, that Deaton has exclusive control of the vehicle and that the owner must park his vehicle on Deaton's lot when requested. All drivers must fill out an application with Deaton and are subject to a medical examination and a Deaton-supervised road test. A company official decides whether or not a driver is acceptable for service in the Deaton fleet. Deaton maintains a list, or pool, of acceptable drivers. Multiple owner-operators select drivers for their equipment from this pool. After his acceptance the prospective driver is oriented by Deaton in regard to Company rules, ICC safety regulations and handling of freight bills. Each driver must sign a "sign-in" book before his vehicle can be dispatched, and Deaton handles all dispatching and supervises loading procedures. Deaton can and does reprimand drivers, including owner-operators and multiple

owner-operators, for late delivery, infraction of ICC rules and Company rules regarding speed, safety, driving practices and loading procedures. Deaton maintains a constant check over all drivers by use of a road patrol. Each driver is required to keep daily inspection reports on the condition of his truck and trailer. Drivers can take extended leave only with Deaton's permission and all drivers are required to attend safety meetings. Deaton can discharge, or remove from its fleet, any driver it does not want, and no individual can drive in Deaton's fleet without Deaton's express approval.

Though payment under the lease agreement appears to be a lump sum computed as a percentage of gross revenue, this figure in reality represents two separate payments — one for truck rental and one for driving services. The lease agreement states that the owner will receive 70 per cent of revenues or frieight classified as 6th class or higher and 75 per cent on freight classified as 7th class or lower.[3] The collective-bargaining agreement specifiies that drivers of leased equipment will receive 20 or 25 per cent of gross revenue, depending on the nature of the freight carried.

Thus, when these two documents are read together, it becomes apparent that there is a standard wage paid for driving, which is determined through collective bargaining and that the balance, depending on the nature of the freight carried, is

[3]The classifications are referred to in the lease agreement as National Motor Freight Classification.

a standard fee paid by Deaton as the fee for rental of the equipment.

We note further that prior contracts between the Union and Deaton contained union-security clauses, dues checkoff, provisions for time off to attend to union business, grievance procedure and arbitration, picket line clause, provision for health and welfare payments, and a seniority clause. These provisions applied to drivers, regardless of their nominal status.

On the basis of the foregoing facts, as the drivers of vehicles bearing the Deaton name and transporting goods for Deaton under its direction and exclusive control, the owner-drivers are employees of Deaton. We conclude also, in view of such control, that the nonowner drivers are employees of Deaton, alone.

In reaching his conclusions that the owner-drivers are independent contractors and that multiple owner-drivers are coemployers of drivers of their extra trucks, the Trial Examiner relied on the *Silk*[4] case. Though that case bears many similarities to the case at bar, it arose under the Social Security Act and dealt with the construction of that Act. Here we are concerned with other legislation. In that case, the court pointed out that in construing social legislation, the terms "employment" and "employee" are to be construed to accomplish the

[4] *Greyvan Lines, Inc., v. Harrison*, 157 F. 2d 412 (C.A. 7) *aff'd. sub nom U.S. v. Silk*, 331 U.S. 704, 67 Sup. Ct. 1463 (1947).

purpose of the particular legislation involved. Drawing upon experience under the National Labor Relations Act for illustration, the court stated:[5]

> The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed " 'in the light of the mischief to be corrected and the end to be attained.' " We conclude that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours, and working conditions.

In the process of amending the National Labor Relations Act in 1947, the Congress addressed itself to this very problem.[6] It required that the terms "employee" and "independent contractor" be given their ordinary meanings, and excluded independent

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[5]331 U.S. at 713, 67 S. Ct. at 1468.

[6]H. R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947); H. R. Conf. Rep. No. 510, 80th Cong. 1st Sess. 33 (1947).

contractors from the Section 2(3) definition of "employee."

The Board, in conformity with Congressional intent, has followed the usual tests of the law of agency and has applied the common law "right of control" test. Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved, but also the means to be used in reaching such end. Consistent with this Congressional mandate, and having in mind the judicial dictate that social legislation be construed "in the light of the mischief to be corrected and the end to be attained," we feel compelled to reach a different conclusion from that of the Trial Examiner and find that the drivers, including owner-drivers and multiple owner-drivers, are employees of Deaton.[7] We are satisfied that the degree of control exercised by Deaton over these individuals as shown in part by the collective-bargaining history, is sufficient to support a finding that they are employees of Deaton both in law and as a "matter of economic reality." As such they are entitled to the rights guaranteed and protection afforded by the Act.

Although we have found, in basic agreement with the General Counsel, that the relationship between Deaton and all drivers of its fleet is one of employ-

[7]The Alabama Supreme Court has reached the same conclusion. *Stevens v. Deaton Truck Line, Inc.*, 54 So. 2d 464 (1959); *Deaton Truck Line, Inc., v. Acker*, 74 So. 2d 717 (1954); *Hays v. Deaton Truck Line, Inc.*, 87 So. 2d 825 (1956).

ment, we do not find that Deaton refused to bargain within the meaning of Section 8(a) (5). The record clearly establishes that multiple owner-drivers have the power to hire and fire drivers of their trucks. Not only do nonowner drivers in the Deaton fleet have to meet with Deaton's preliminary approval and cannot be hired without such approval, they also have to meet with the approval of, and are, in effect, hired by the owner of the truck. Moreover, the multiple owner-drivers assign drivers to trucks and transfer them from one truck to another without the knowledge and consent of Deaton. They can also fire drivers insofar as driving their trucks is concerned, but in such circumstances the driver remains in the pool and can be selected by another multiple owner-driver, without need of further clearance by Deaton. Under these circumstances we find that the multiple owner-drivers, possessing the power substantially to effect the hire and discharge of employees, are supervisors within the meaning of the Act. Inasmuch as the Union insisted upon their inclusion in the unit, as Respondent is under no duty to bargain for a unit including supervisors and as such insistence was one of the obstacles to the conclusion of an agreement, we find that Respondent has not violated Section 8(a) (5) by its refusal to bargain for the unit insisted upon by the Union.[5]

The complaint also alleges that on July 19, 1962, Respondent unilaterally solicited its truckdrivers

[5]Cf. *Great Western Broadcasting Corporation* d/b/a KXTV, 139 NLRB No. 11.

to execute agreements which would change the status of the drivers from employee to independent contractor. Such conduct could, arguably, constitute a violation of the Act. However, just 1 week later the parties entered into a written "Truce Agreement" continuing in effect the terms and conditions of the last contract, which, in effect, rescinded the complained of action. That agreement is still in force. Thus, under these circumstances no useful purpose would be achieved by issuing a remedial order even were a violation to be found as to this aspect of the complaint. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D.C., Aug. 15, 1963.

Frank W. McCulloch, Chairman

Boyd Leedom, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

MEMBER RODGERS, concurring:

While I agree with my colleagues that the complaint should be dismissed, I disagree with their findings as to the status of the truckdrivers. In my

opinion, all the owner-operators are independent contractors and the nonowner drivers of leased trucks are employees of the truck owners alone. *Greyvan Lines, Inc., v. Harrison,* 156 F. 2d 412 (C.A. 7), affd. *sub nom U. S. v. Silk,* 331 U. S. 704, 67 Sup. Ct. 1463 (1947); *Oklahoma Trailer Convoy, Inc.,* 99 NLRB 1019; *Eldon Miller, Inc.,* 103 NLRB 1627 and 107 NLRB 557; *Malone Freight Lines,* 106 NLRB 1107 and 107 NLRB 501; *N.L.R.B. v. National Van Lines, Inc.,* 273 F. 2d 402 (C.A. 7).

Accordingly, I concur only in the result reached by my colleagues.

Dated, Washington, D. C. Aug. 5, 1963.

Philip Ray Rodgers, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX C

IR-38-63
Birmingham, Ala.

INTERMEDIATE REPORT

(Number and Title Omitted)

Statement of the Case

Upon a charge duly filed on July 13, 1962, the General Counsel for the National Labor Relations Board for the Regional Director for the Tenth Region (Atlanta, Georgia), issued a complaint on August 24, 1962, against Deaton Truck Lines, Inc., herein called the Respondent or the company, alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. The Respondent's answer denies the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held in Birmingham, Alabama, on October 30 and 31, 1962, before the undersigned Trial Examiner. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses and to file briefs. Briefs were filed by the General Counsel, the Respondent and the Charging Party and they have been carefully considered.

Upon the entire record in this case, and from my observations of the witnesses, I hereby make the following;

Findings of Fact and Conclusions

I. The business of the Respondent

Deaton Truck Lines, Inc., is an Alabama corporation with its office and place of business located at Birmingham, Alabama, where it is engaged as a common carrier by motor vehicle in the interstate transportation of freight.

During the 12 months preceding the hearing herein, Respondent received more than $50,000 from the interstate transportation of freight.

The Respondent concedes, and I find, that it is and has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 612, herein referred to as the Union or the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act.

A. *The operations of the Company; the types of drivers*

The Respondent Company, an irregular common carrier operating under the authority of the Interstate Commerce Commission, is principally engaged

in the long distance hauling of freight. As is typical of some larger motor carriers, a substantial portion of its fleet consists of trucks leased to it by individual truck owners. This case is largely concerned with the status of the various individuals who lease and/or drive trucks for the Company. The categories of individuals involved in this case may be broken down and defined as follows: *Company driver*: an individual who drives a truck owned by the Respondent; *owner-driver*: an individual who owns and leases one truck to the Respondent and drives it; *nonowner-driver*: of a leased truck: an individual who drives a truck owned by the lessor; *multiple owner-driver*: an individual who owns more than one truck and leases them to the Respondent. An individual in this category drives one truck, the others being driven by a nonowner driver; *owner-nondriver*: an individual who leases one or more trucks to the Respondent but does not drive.

At about the time the issue herein arose the Respondent maintained somewhat in excess of 260 trucks in its operation. Of these, 148 were driven by owner-drivers and 112 were driven by non-owner drivers. Three Deaton owned trucks were driven by company drivers acknowledged to be Respondent's employees.

B. *Bargaining history*

On August 13, 1956, following an approximate 10 weeks' strike, Respondent Deaton Truck Lines, Inc., entered into an agreement referred to as

"working rules" with a group designated therein only as the "Committee". The sole reference to the Charging Union in this document was a clause providing that "management agrees to continue the practice of checkoff of union dues and the payment of the same to Local 612, Teamsters A.F. of L."

In May 1957, Respondent and the Charging Union entered into a collective-bargaining agreement which was made effective from May 21, 1957 to July 31, 1959. Upon its expiration this was succeeded by a second agreement effective from August 1, 1959 to July 31, 1962. It might be stated here that neither of these contracts set forth a clear definition of the bargaining unit. Thus, the recognition clause in the agreement provides as follows:

> The experience of both parties hereto believe that harmonious relations among employees and between the Employer and the Union can best be obtained when all the employees for whom the Union is the collective bargaining representative are members in good standing of the Union. It is therefore agreed that subject to applicable law, all employees for which the Union is the bargaining agent as provided herein shall become and remain members of the Union during the life of this Agreement . . .
>
> The Employer agrees, subject to [State and Federal laws] that all Mechanics, Helpers, Drivers, Driver Owners, etc., covered by this Agreement, employed by the Company must become members of Local Union No. 612 if their employment continues beyond (30) days from the date of their hiring.

Other terms of the collective-bargaining agreement will be referred to as is hereinafter deemed appropriate.

C. *The 1962 negotiations*

It should first be mentioned that a transfer of ownership of Deaton Truck Lines occured on March 15, 1960, at which time the Company was purchased by Edwin M. Sellers. Sellers, who is Respondent's president, owns 98-99 percent of the Company's stock. It is undisputed that the present ownership continued to operate under the then current agreement with the Charging Union.

On May 11, 1962, the Union notified the Respondent by letter that it desired to open the existing agreement and that it would submit a copy of its proposed changes in the near future. Not having heard any further from the Union, Respondent's attorney, Mark L. Taliaferro, finally called the Union in the latter part of June. It was agreed that a meeting would be held at the Joey Young Cafe in Birmingham on June 27.

At this point we pause to mention that in May 1962, three lawsuits were pending in Federal and State courts between the Respondent and the Union. Two were instituted by the Union and one by the Respondent. Without belaboring this report with the details of this litigation, suffice it to say that each of these cases involved the question as to whether the driver-owners occupied the status of employees or independent contractors.

Not much was accomplished at the meeting of June 27. Respondent indicated that it was willing to negotiate but that it was not abandoning its defense to the Union's lawsuits to the effect that the owner-drivers were independent contractors. The Union did not present any contract proposals at this meeting but indicated that it soon would submit its proposals in writing.[1]

The Union's Contract proposals, as reduced to writing, were delivered to President Sellers on July 2 by G. S. Webb, president and business manager of the local union. It is not of sufficient importance to the issues herein to detail these proposals except to say that they presented substantial and extensive changes from the existing agreement. One proposal which the record reveals to be particularly objectionable to the Respondent was that which called for compensation to the drivers based on a mileage basis rather than compensation based upon a percentage of revenue. The latter being the method under which Respondent historically operated. Webb testified that after "thumbing through" the Union's proposals Sellers stated that the "type of proposal" was "ridiculous" for his operation. Webb further testified, without contradiction, that "at that time he [Sellers]said that the only thing he could be agreeable to was to let the present contract continue in its old status or maybe negotiate one or two minor changes, provided that we would stipulate that the drivers were independent busi-

[1] While there is other testimony concerning this meeting, I do not deem it necessary to spell it out in this report. As noted hereinafter, the issues pertinent hereto were brought to a head by the subsequent stands of the parties.

nessmen until such time as the court could decide the question."

A final meeting between the parties was held in the office of Attorney Taliaferro on July 18. The substance of the Respondent's position at this meeting is summed up in the following letter of the same date which Sellers sent to Webb:

> At our meeting today we restated to you our offer heretofore made you in June. That offer was and still is that we are willing to continue operating as in the past. That is, under a contract similar to the one we have operated under for the past three years. We again repeat, as we did in the previous meetings, that we are not willing to change our fundamental way of doing business for the purposes of effecting a change in the status of the lessor-owners.
>
> In short, we will continue under the old or a similar contract and under the old or similar lease and pursuant to our usual method of doing business, pending a final determination in court of the cases which you have brought against us and we have brought against you, which, among other things, involve and would result in a determination of the status either as independent contractors or employees of our lessor-owners.

On July 19, the Respondent wrote identical letters to each of the driver-owners, enclosing copies of new leases to each of them. The pertinent portion thereof, which is self-explanatory, is as follows:[2]

[2] The letter began with a brief summation of the contract negotiations.

> The Company takes the position that each of you is an independent contractor. The Union takes the position that you are employees of Deaton Truck Line. We are in such fundamental disagreement on this subject that there seems to be no possibility of reaching an agreement. For this reason, we want you to know how we propose to operate with each of you as individual lessor-owners.
>
> In accordance with paragraph 3 of the present lease, we are giving you thirty days' notice effective August 1, 1962, that your present lease is terminated . . .
>
> We are enclosing two(2) copies of a new lease that has been executived by an official of the Company. If you are desirous of operating for Deaton Truck Line in the future, please execute both copies of this new agreement and have it witnessed under your signature . . .

On July 26, while engaged in litigation in the U.S. District Court for the Northern District of Alabama, and apparently at the court's behest, the Union and the Respondent entered into a written "Truce Agreement" which continued the terms and conditions of the last contract, subject to termination by either party on 30 days' notice. This truce agreement continued to be in effect as of the date of the hearing herein.

D. *The issue*

As has been apparent from the foregoing, it is the Respondent's Position that the owner-drivers

are independent contractors. The General Counsel and the Union, on the other hand, contend that these individuals are employees within the meaning of the Act. In addition there is dispute concerning the status of the nonowner-drivers. Although these individuals are acknowledged by all parties to be employees, the General Counsel contends them to be employees of the Respondent while the Respondent takes the position that they are the employees of the lessor truck-owners whose respective trucks they drive.

The parties are in agreement only as to the status of the employees who drive trucks owned by the Respondent and as to the individuals who lease trucks to the Respondent but are not engaged in the capacity of drivers. As to the former, the Respondent concedes these to be its employees and asserts that it is willing to bargain with the Union concerning their wages, hours and other terms and conditions of their employment. As to the latter, that is the lessor-nondrivers, the Union disclaims any intentions to represent these individuals.

Preliminary to a discussion of the questions thus presented, the undersigned at this point would find that, assuming all or any of these individuals to be Respondent's employees, the Respondent's position at the July 18 meeting constituted a clear cut refusal to bargain within the meaning of Section 8 (a) (1) and (5) of the Act. Thus, it is clear that at this meeting Respondent took the unequivocal position that it would neither discuss or consider

the Union's new proposals unless and until it received an adverse court decision concerning the status of the individuals involved.

Of course, the Respondent has, as it asserts, the legal right to take whatever position it wishes while engaged in private litigation. But it hardly can be questioned that Respondent's obligations under the Act continue notwithstanding its involvement in other litigation. Under the preemption doctrine it is well settled that the Board is vested with exclusive jurisdiction in deciding all matters involving alleged violations of the National Labor Relations Act, as amended.[3]

By refusing to bargain with the Union on the grounds indicated above, the Respondent has, in effect, challenged the appropriateness of the collective-bargaining unit. In electing to rely upon its position as to the status of the individual in question it has acted at its peril; for if its position is declared to be erroneous under the Act it has, by refusing to bargain with the Union, committed an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.[4] *Keystone Floors, Inc., d/b/a Keystone Universal Carpet Company*; 130 NLRB 4; *Tom Thumb Stores, Inc.*, 123 NLRB 833. Obviously the opposite result would be reached if Respondent's position is correct.

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[3] *Building Trades Council v. Garmon*, 359, *U.S.* 236, *Engineers Ass'n v. Interlake Steamship Co.*, 50, LRRM 2347.

[4] This, of course assumes also that the Union represents a majority of the employees in the appropriate collective-bargaining unit, a matter which is discussed in this report.

E. *Evidence as to the status of the owner-drivers and the nonowner drivers*

The evidence pertinent to a determination of the status of the above individuals as employees or independent contractors is largely undisputed. The parties introduced in evidence a copy of the standard lease agreement. Additionally, testimony on this subject was given by two drivers and certain of Respondent managerial employees, all of which is uncontroverted.[5] From the foregoing, my findings with respect to the parties' obligations under the lease agreements and the practices of the parties outside of the agreements are set forth as follows:[6]

The lease Agreements provide that the Respondent shall have the exclusive use and control of all vehicles leased to it and that such vehicles shall not be used for the transportation of freight for other persons. In accordance with ICC regulations, the leases are terminable by either party upon 30 days' written notice. Also in accord with ICC rules, the leased vehicles are required to bear the Respondent Company's name and the ICC certificate number.

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[5] I am cognizant that Sellers, when called as an adverse witness under rule 43B, was recalcitrant on at least one occasion when being questioned by counsel for the Charging Party concerning the posting of seniority lists. However, this matter in itself is not dispositive of the issues herein. Careful weight has been given to all of the testimony in this case, including the sworn testimony in other proceedings which the parties introduced in evidence at the instant hearing.

[6] The relevant terms of the contract between the Respondent and the Union will be alluded to when appropriate.

The owner-lessors are free to purchase whatever model or make of truck they choose and from whom they choose. Respondent does not participate in the financing thereof. Trade-ins or any other disposal of equipment lies exclusively within the option of the owners. As to the maintenance and repair of trucks, this is the personal responsibility of the owners and they must bear all cost incidental thereto. Gasoline, tires and other necessary upkeep equipment are purchased and paid for without restriction by the owners.[7]

Public liability, property damage and cargo insurance on all leased vehicles are paid for by the Respondent, except that the liability insurance does not cover the vehicles when not in use on company duty; but claims for breakage, shortage, damage by water, and the like, must be paid for by the owner. License tags must be purchased by the owner. Comprehensive collision, fire and theft insurance are taken out and paid for by the owner but State and Federal identification plates are bought and paid for by the Respondent Company. The lease provides that the owners park the vehicles on the premises of the Company in Birmingham, Alabama, the home base, "as and when requested by the Company to do so."

Respondent pays owners and owner-drivers for lease of the equipment only. This is done on a percentage of gross revenue basis, the owner's percent-

[7] At their option, the owners may purchase and charge gasoline to Respondent's gas dealer credit accounts and later reimburse the Respondent therefor.

age being 70 percent of gross revenue on all freight classified sixth class or higher, and 75 per cent on all freight classified as seventh class or lower. The owner-drivers are not paid separate compensation for the services of driving their trucks.

All prospective drivers, be they owner-drivers or nonowner-drivers, are required to fill an employment application with the Company. Largely in accordance with ICC rules, the Company verifies the individual's driving qualifications, including age, driving skill and experience, and his knowledge of English and ICC Regulations. Also in accord with ICC rules, the applicant is required to take a physical examination which is paid for by him. Included in these preliminaries is a driving test which is given by qualified company personnel.

When an applicant passes the screening tests as aforesaid, a personnel file containing records to this effect is set up by the Respondent and he is issued a card to show that he is qualified to drive for the Company. Prior to making an actual run, various of Respondent's personnel give brief instructional training to the qualified driver as to safety precedures and as to Respondent's methods of operations, the latter including the manner of dispatching, preparation of driver's logs, the handling of shipping documents, and the like.

The Respondent's operations include both regular and irregular runs with the latter constituting the bulk of Respondent's business. In regular runs, trucks are dispatched in the order they appear on

a "ready board" which is signed by the driver. The record is somewhat vague as to what procedure is utilized in the assigning of trucks to the irregular runs. In any event, from the record it is clear that trucks and drivers must be ready for dispatch at all appropriate times. Thus the drivers (including owner and nonowner-drivers) sign a "ready" list and they are assigned in the order their names appear on such list. However, the driver whose name is on the list is not obliged to take the load if the owner of the truck wishes to substitute another qualified driver."[8]

The owner-drivers assigned to irregular runs have discretion to travel on whatever route they wish to the delivery point as long as the deliveries are timely made. Owner-drivers of more than one truck may also instruct their drivers as to the route to be taken. The truck owners and their drivers may stop and rest for the night when and where they choose.

Although Respondent maintains terminals in various cities within its operating areas, loads are usually delivered to the consignee rather than to Deaton docks. Upon delivery of a load the drivers are required to telephone the closest company terminal so that instructions may be given concerning any return loads.[9] Where the deliveries are made in places not in proximity to Company

[8] Testimony of Sellers in Civil Action No. 10135-S.

[9] The drivers must call the Respondent's headquarters in the event of a breakdown or other unusual occurrence which would interfere with normal delivery time. Such calls are paid for by the truck owner.

terminals the drivers are encouraged to solicit whatever business they can 'on their own' for the return trip.

The record reflects that while as a general rule the drivers do not participate in the unloading of trucks, there are some occasions when they do participate in this work. In these latter instances the driver may hire additional help at his discretion and for this he is reimbursed by the Company for a cost not to exceed $6.00.[10]

The Respondent maintains two patrol cars manned by the safety inspectors who patrol the road to ascertain whether all drivers maintain proper speed and comply with ICC safety regulations. In the event of such safety infractions the drivers are issued a written warning notice, a copy of which is placed in the Respondent's personnel files. In the event of a gross violation the driver may be stopped and warned on the spot.[11]

The drivers may take time off for short periods of time provided that other drivers are made available to take their place. In the event of a longer period, all drivers, including owner-drivers must obtain a leave of absence approved by the Respondent and the Union.[12] Unless the leave period is for

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[10] This practice has been incorporated in the contract between Respondent and the Union.

[11] A driver could be removed on the spot if, for example, he were intoxicated.

[12] Respondent posted a bulletin to this effect on May 9, 1960. This procedure is also incorporated in the contract between Respondent and the Union.

an extended time, the owner-driver could substitute another driver for himself.[13]

On occasion the Company issues memoranda or bulletins usually addressed to "operators," which are posted on its bulletin boards. The bulletins introduced in evidence include and pertain to the following: leaves of absences (as noted heretofore); an "agreement" that management will not request drivers to enter strike bound premises; a notice reminding drivers that they should check in with the Memphis terminal for loading instructions when in that area; Instructions not to use third chains in the loading of Johns-Manville pipe since this practice resulted in damage to this material;[14] a notice dated July 6, 1961, requiring the operators to attend a safety dinner; and finally, a notice warning operators that they would be subject to disciplinary action if they failed to report to the nearest terminal manager in the event a delay in route would cause delay in delivery to the consignee.

In addition to these bulletins, the record reveals that the Respondent issues warning notices or letters to the drivers for various ICC and company rule infractions. Numerous copies of such letters were introduced in evidence. The type of warning

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[13] James M. Sizemore, vice president and safety director for the Respondent, testified that an owner's lease would be terminated if he decided not to haul freight for a longer period, such as 6 months. "Otherwise," Sizemore testified: "If a man wants to take off for a week we tell him to get somebody else to drive but the way our business is now we are not in a position to let any truck set up for a week or a month or anything else."

[14] But it is noted that under the lease Agreement the owner is responsible for damage to cargoes from improper loading.

most frequently issued is that pertaining to the drivers' falure to properly maintain their daily logs which show the number of hours driven as well as the different trucks driven by the respective driver. It is incumbent that these logs be maintained, for the data contained therein must be compiled in monthly reports which the Respondent is required to file with the ICC.[15] Other warning letters refer to such matters as delays in delivery, violations of safety rules (such as speed, turn signals, etc.) and improper parking. Although the merits of the case as discussed below, it is noted here that the General Counsel, in arguing that the warning notices are indicative of an employee relationship, places stress upon a letter dated February 5, 1962, which the Respondent issued to one George Boyce warning him against any repetition of "insubordination or interference with company property or business." I would note first that the evidence does not reflect whether Boyd was a driver-owner or a nondriver-owner, a matter which, as hereinafter indicated, is of no little importance. Secondly, not only does the evidence fail to indicate the facts with respect to the conduct involved, but insofar as the record is concerned this matter appears to be an isolated incident and may well have been one of considerable aggravation.[16]

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[15]ICC revised Rules and Regulations, Section 159.9. In this connection it was Sellers' unrefuted testimony that: "Since May we have received a letter from the Interstate Commerce Commission complaining about the over hours on logs and violations of logs" . . .

[16]In its brief the Respondent set forth facts which it alleges were involved in this incident. Since this matter was not litigated, the facts as therein set forth cannot be accepted as evidence.

We now turn to other aspects of the relationship between the parties involved. As to withholding taxes and social security, these are paid for by the driver-owners themselves, not by the Respondent.[17] Moreover, the driver-owners who lease more than one truck to the Respondent deduct these items for their own respective drivers. This, then, brings us to the point of stating the facts applicable to the relationship of the nonowner-drivers with the lessor-owners of the trucks and with the Respondent Company. As had been previously stated, all prospective drivers including owner and nonowner-drivers must file an application with the Respondent and must be approved by the Respondent before they are qualified to drive in Respondent's fleet. However, the actual hiring is done by the owner of the truck. The truck-owner is not required to hire any such applicant but is free to decide this matter for himself. Thus, when a driver files an application with Respondent and it is approved the Respondent will introduce him to the truck-owner. The truckowner is not required to hire any such applicant but is free to decide this matter for himself. It is undisputed that the truck-owner must give his approval before any driver can drive for him. On the other hand, any applicant brought in by the truck driver must meet the Respondent's qualifications before the owner can hire him.

Nonowner-drivers of such leased equipment are paid by the owner of the truck. All such drivers

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[17]Respondent deducts these items only for the drivers of its own trucks, these being its conceded employes.

are paid the standard rate consisting of 20 per cent of gross revenue and 25 per cent on over width loads or freight carrying premium rates.[18] In addition, the individual owners are free to pay the drivers extra compensation, such as a bunk allowance, if they wish.

Finally, as to termination of the nonowner drivers, the record is clear that these drivers may be discharged either by the Respondent or by the owners of the lease agreement.[19]

F. *Conclusions as to the lessor driver-owners*

The question of employee vs. independent contractor relationship has been considered by the Board and the courts in numerous cases, a particularly large body of which involves the trucking industry. It would unduly burden this report to attempt to distinguish the fine lines upon which the bulk of the cases on this subject have been decided. However, practically all cases decided since 1946 look to the Supreme Court's decision in the *Silk* case[20] as the governing guideline decision in this field. In that case the Court laid down the following criteria which has become a familiar quotation:

Probably it is quite impossible to extract from

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[18]The agreement between the Union and the Respondent provides that "owners of leased equipment agree drivers of said equipment shall be paid a minimum [of the rates set forth above.]"

[19]It is the undisputed testimony of Sellers that he knew of numerous instances of where lessor owners discharged owners who worked for them.

[20]*Greyvan Lines, Inc., v. Harrison*, 156 F. 2d 412 (C.A 7), affirmed sub nominee, *U.S. v. Silk*, 331 U.S. 704, Sup. Ct. Rep. 1463.

the statute a rule of thumb to define the limits of the employer-employee relationship. The Local Security Agency and the Courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete.

The facts in the *Silk* case, as evidenced by the following quoted portions from the court's decision, bear a striking similarity to those in the instant case:

> The system was based on contracts with the truckmen under which the truckmen were required to haul exclusively for the Respondent and to furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operations, to pay for all fire, theft and collision insurance which the respondents might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused by the acts of the truckmen and employees, to paint the designation "Greyvan Lines" on their trucks . . .
>
> * * * *
>
> ". . . to personally drive their truck at all times . . . (except in emergencies, when a substitute might be employed with approval by the company), and to follow all rules, regulations, and instructions of the company. All contracts or bills of lading for the shipment of goods were to be between the respondent and the shipper.

> The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3 % for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the companys' methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company.

Under the foregoing facts the court held the driver-owners of the trucks to be independent contractors. The total circumstances here being so closely analogous to those considered in the decision of the Supreme Court, I think it is clear, and I find that the driver-owners who lease trucks to the Respondent in the instant case are independent contractors, not employees of the Respondent. It might be added that trucks of suitable power to haul Deaton's cargoes cost from $7,500 up if gasoline powered, and from $15,000 up if diesel powered. In this connection I concur with and regard as also applicable here the statement by the Trial Exam-

iner in the *Lyon Van & Storage case,*[12] who, commenting on the *Silk* case, stated:

> Applying the criteria of the Court and the Board to the undisputed facts of the contractual relationship of the owner-drivers of the Company here, I cannot agree that these owner-drivers, who supply equipment of the approximate value of $15,000 each, are in the same category as the unloaders of coal who provided picks and shovels to the job and who gained their livilihood exclusively "from the work of their hands and these simple tools." On the contrary it seems crystal clear to the Trial Examiner that the owner-drivers in the instant case are similar to the owner-drivers in the *Silk* and *Greyvan* cases, and that they must be held to be independent contractors.

Indeed, the driver-owners who lease more than one truck to the Respondent in this case have a substantially greater investment at stake than did those in the case cited above.

In the *Lyon Van* case, *supra,* the drivers were treated as holding a dual capacity, being employees as to the tasks of driving the trucks and being independent contractors as to the lease of the equipment which each furnished. In its brief the Union argues that "in the instant case the drivers, at the very worst, should be viewed in such 'dual capacity'." However, the facts in the *Lyon Van* case upon which this holding was premised are materially different from those in the case at bar. Thus in

[12] *Lyon Van & Storage Co. and Lyon Van Lines, Inc.,* 123 NLRB 734.

the *Lyon Van* case the principal basis for holding the driver-owners to be employees as well as independent contractors was premised upon the fact that they were paid *"two types of compensation,"* one being computed for the *"payment of labor"* (the driving function) pursuant to a contract between the Company and the Union, the other compensation being for *"the rent of the equipment"* as fixed by the terms of the lease agreement. As heretofore noted, the owner-drivers in the instant case are compensated *only* on a percentage of revenue basis as set forth in the lease agreements.[22] Clearly, there is no provision that the owners be paid separately for their driving services. Accordingly, the Union's Argument as aforesaid must be rejected.

G. *Conclusions as to the nonowner-drivers.*

My conclusion with respect to the status of the individuals who do not own or lease any trucks to the Respondent but who serve solely in the capacity of drivers may be stated briefly. It will be recalled that the drivers in this category can be hired only upon the condition that there is joint approval by the Respondent and by the particular lessor whose trucks they drive. Similarly, these drivers can be discharged or otherwise terminated by either the lessor or by the Respondent. Clearly, the authority to control the employees' hire or tenure of employment is one of the basic and perhaps one

[22] I regard it immaterial that the existing method of remuneration was incorporated in the agreement between the Respondent and the Union. The record is clear that in the past there has been no bargaining between the parties concerning the method or amount of compensation, as fixed by the lease agreement.

of the most significant attributes of an employment relationship. Since these functions are jointly vested in the control of both the Respondent and the lessor truck owner. I find and conclude that Respondent and the lessors are co-employers of the nonowner-drivers.[23] As a coemployer, Respondent was bound to bargain with the Union for these employees.

H. *The alleged Section* 8(*a*) (5) *violations*

In accordance with all of the foregoing, it is found that the appropriate collective-bargainings unit consists of all employees of the Respondent, including yard employees and nonlessor truckdrivers, but excluding lessors and lessor truck drivers, office clerical employees, professional employees, guards and supervisory employees as defined in the Act. It is further found that the Union at all relevant times has represented a majority of Respondent's employees in the said appropriate unit.[24]

Accordingly, I find that the Respondent, by its actions and conduct on and after July 18, 1962, all of which have been described under the headings "The 1962 negotiations" and "The issue," has failed and refused to bargain with the Union in violation

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[23]See *Highway Truck Drivers and Helpers, et al. (Sterling Wire Products Company)*, 137 NLRB No. 150; Local No. 24, *Teamsters et al. (A.C.E. Transportation Co.)*, 120 NLRB 1103; set aside 266 F. 2d 675 (C.A.D.C.).

[24]It is unrefuted that as of the time of the hearing these employees were members of the Union as evidenced by monthly dues checkoff and health and welfare payments to the Union.

of Section 8(a) (5) of the Act, and, derivatively, of Section 8(a) (1) thereof.[25]

Finally, the complaint also alleges that Respondent violated Section 8(a) (1) and (5) by unilaterally soliciting its truckdrivers to execute agreements declaring and providing that their status be that of independent contractors rather than employees. However, since the proposed new lease agreements were sent only to the lessors whom I have found to be independent contractors, Respondent was free to take this action if it so chose.[26] Accordingly, I shall recommend that this allegation be dismissed.

IV.. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with its business operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found the Resondent has failed and re-

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[25]In view of the undersigned's disposition of this case, it is unnecessary to pass upon the Respondent's argument set forth in its brief under the heading "The Union is not competent to represent the unit sought in this case."

[26]While not pertinent to this finding, I might note that the Board has held that any attempt to label a relationship under a contract is not controlling. *Keyston Floors, Inc., supra*; *Toledo Seale Company*, 82 NLRB 826.

fused to bargain with the Union as the statutory representative of its employees in an appropriate unit, I shall recommend that Respondent be ordered to bargain, upon request, with the Union and, if an understanding is reached, to embody such understanding in a signed agreement.

In view of the nature of the unfair labor practices herein found it is further recommended that the Respondent cease and desist from infringing in any manner upon the rates guaranteed employees by Section 7 of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, the undersigned makes the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. All employees, including yard employees and nonlesssor truckdrivers, but excluding lessors and lessor truckdrivers, office clerical employees, professional employees, guards and supervisory employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining.

3. On or about July 18, 1962, and at all times since, the Union has been, and now is, the exclusive

representative of all employees in said unit for the purposes of collective bargaining.

4. By refusing to bargain collectively with the union as such collective-bargaining representative, and thereby interfering with, restraining and coercing employees in the exercise of their rights under the Act, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that Deaton Truck Lines, Inc., its officers, agents, successor and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 612, as the exclusive representative of employees of Respondent in an appropriate unit consisting of all employees, including yard employees and nonlessor-drivers, but excluding lessors and lessor truck drivers, office clerical employees, professional employees, guards and supervisory employees as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the

exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 612, as the exclusive representative of all employees in the appropriate bargaining unit as foresaid, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Birmingham, Alabama, copies of the notice attached hereto and marked Appendix.[27] Copies of such notice, to be furnished by the Regional Director for the Tenth Region, shall, after having been duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[27]In the event of Board adoption of this Recommended Order, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event of enforcement of the Boards Order by a decree of a United State Court of Appeals, the words 'A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(c) Notify the Regional Director for the Tenth Region in writing within 20 days from receipt of this Intermediate Report what steps Respondent has taken to comply herewith.[28]

Dated at Washington, D.C., Feb. 4, 1963.

(Signed) JOHN P. von ROHR

John P. von Rohr

Trial Examiner

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[28]In the event of Board adoption of this Recommended Order, this provision will be modified to read: "Notify said Regional Director in writing within 10 days from the date of this order what steps the Respondent has taken to comply herewith."

APPENDIX D

STATUTORY APPENDIX

Portions of Labor-Management Relations Act, as amended, 29 U.S.C., § 151 *et seq.*

§ 2(3)

SEC. 2. When used in this Act— . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 2(11)

(11) The term "supervisor" means any individual having authority, in the interest of the employer,

to hire, transfer, suspend, lay off, recall, promote, discharge, assign reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 7

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a abor organization as a condition of employment as authorized in section 8(a) (3).

§ 8(a) (1)

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

§ 8(a) (5)

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

§ 8(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

§ 14(a)

SEC. 14. Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 2091

DEATON TRUCK LINE, INC.,
Petitioner.

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 21332

TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN & HELPERS, LOCAL UNION 612,
Petitioner.

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petitions for Review of Orders of the National Labor Relations Board, sitting at Washington, D. C. (December 21, 1964)

ON PETITIONS FOR REHEARING

Before HUTCHESON and RIVES, Circuit Judges, and GROOMS, District Judge.

PER CURIAM:

The petitions for rehearing filed respectively by Deaton Truck Line, Inc., and by Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 612, are hereby

DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DEATON TRUCK LINE, INC., *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD *Respondent.*	No. 20791
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL UNION 612, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 21332

DECREE

Before: Hutcheson and Rives, Circuit Judges, and Grooms, District Judge.

BY THE COURT

THIS CAUSE came on to be heard upon petitions to review an order of the National Labor Relations Board dated August 15, 1963, which dismissed an unfair labor practice complaint against Deaton Truck Line, Inc. The Court heard argument of respective counsel on June 5, 1964, and has considered the briefs and transcript of record filed in this cause. On October 2, 1964, the Court, being fully advised in the premises handed down its decision dismissing the petition for review in No. 20,791 and denying the petition for review in No. 21,332. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the petition to review filed by Deaton Truck Line, Inc., in No. 20,791 be, and the same hereby is, dismissed.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the petition to review filed by Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 612 in No. 21,332 be, and the same hereby is, denied.

ENTERED: DEC. 30, 1964.

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CITATIONS

Cases:

Alabama Marble Co., 83 NLRB 1047 — 8

Bethlehem Steel Co. (Shipbuilding Div.) v. *National Labor Relations Board*, 320 F. 2d 615, certiorari denied, 375 U.S. 984 — 8

Brewery and Beverage Drivers, Local 67 v. *National Labor Relations Board*, 257 F. 2d 194 — 8

Deaton Truck Lines, Inc. v. *Local 612, etc.*, 314 F. 2d 418 — 4

Deaton Truck Lines, Inc. v. *Local Union No. 612*, No. 10135–S, N.D. Ala. — 4

Fibreboard Paper Products Corp. v. *National Labor Relations Board*, 379 U.S. 203 — 9

International Brotherhood of Teamsters, etc., Local 612 v. *Deaton Truck Lines, Inc.*, 307 F. 2d 748 — 4

Local 24, Teamsters v. *Oliver*, 358 U.S. 283 — 8

National Labor Relations Board v. *Columbian Enameling and Stamping Co.*, 306 U.S. 292 — 7

National Labor Relations Board v. *Retail Clerks*, 203 F. 2d 165, 211 F. 2d 759, certiorari denied, 348 U.S. 839 — 9

Page Aircraft Maintenance, Inc., 123 NLRB 159 — 8

Quality Food Markets, Inc., 126 NLRB 349 — 8

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 — 9

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 998

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 612, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) is reported at 337 F. 2d 697. The Board's decision and order (Pet. 1b–13b, 1c–29c) are reported at 143 NLRB 1372.

JURISDICTION

The decision of the court of appeals was rendered on October 2, 1964 (Pet. 1a). Petitions for rehearing filed by both the employer and petitioner union were denied on December 21, 1964 (Pet. 1e). The decree

of the court of appeals was entered on December 30, 1963 (Pet. 1f–1g). The petition for certiorari was filed on March 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the employer refused to bargain in violation of the National Labor Relations Act in rejecting a union bargaining demand for a unit which included supervisory personnel.

2. Whether substantial evidence supports the Board's finding that the employer's multiple-owner-drivers are supervisors within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 1d–3d of the petition.

STATEMENT

Deaton Truck Lines, Inc., is a common carrier, located in Birmingham, Alabama, engaged in the long-distance hauling of freight by motor vehicle (Pet. 2b; R. 15, 21 D.A. 45).[1] Deaton has 263 trucks in

[1] "R." references are to the printed Transcript of Record in case No. 20791 (*Deaton Truck Lines* v. *National Labor Relations Board*) which was consolidated with the instant case, No. 21332, in the court of appeals. "D.A." references are to the appendix to Deaton's brief in No. 20791. "J.A." references are to the joint appendix of the Board and the Union in the court of appeals. Copies of these documents have been filed with the petition.

its fleet, owning three outright and operating the balance as lessee. (Pet. 2b; D.A. 47). Deaton leases 110 of these trucks from nondriver-owners who furnish a driver with the truck. The remaining 150 are leased either from owner-drivers who own a single truck which they drive themselves, or from multiple-owner-drivers who own several trucks and who drive one truck themselves and furnish drivers with the others. (Pet. 2b, 5b–6b; D.A. 47, 58, 163.)

In August, 1956, after a 10-week recognition strike, Deaton and a "Committee" comprised of several owner-drivers and representatives of Teamsters Local Union 612 ("the Union") entered into an agreement setting forth "working rules" for Deaton's drivers (Pet. 2b; J.A. 94–95, D.A. 100). In May, 1957, Deaton and the Union entered into a more conventional collective bargaining contract. This agreement expired in 1959 when the parties executed a contract with an expiration date of July, 1962 (Pet. 2b; J.A. 215, 283).

In 1960, Deaton was sold to Edwin Sellers (Pet. 3b; J.A. 51–52, D.A. 26). Sellers continued to operate under the 1959 collective bargaining agreement (Pet. 3b; J.A. 86–88, 100). On May 11, 1962, the Union notified Deaton that it desired to open the existing agreement (Pet. 3b; J.A. 82, 249). Negotiating meetings were held by Deaton and the Union in June and July, 1962 (Pet. 3b–4b; J.A. 27–28, 83–85, 88). The contract proposals which the Union presented to Deaton differed from the existing agreement in that they provided for payment of drivers on a mileage,

rather than a percentage-of-revenue, basis and for payment of separate amounts for driving and for truck rental (R. 84; J.A. 27–28, 250–252, D.A. 120–149). The Union's proposed contract also provided that all of the drivers were to be considered as Deaton employees (Pet. 3b; D.A. 121).[2] Deaton objected to the Union's proposals, stating that it was "unwilling to recognize the drivers as 'employees' for the purpose [of] negotiating a new contract" (Pet. 4b; J.A. 28, 250).[3] Sellers stated that he would agree to an extension of the existing contract, or to negotiate minor changes in it, provided the Union would stipulate that the owner-drivers were to be considered independent contractors pending the outcome of three

[2] There were then three suits involving Deaton and the Union pending in the federal courts concerning the question whether the owner-drivers were employees or independent contractors. Deaton's position was that they were independent contractors (Pet. 3b, 5c; D.A. (Vol. III) 76, 87–88, D.A. (Vol. IV) 14, D.A. 45 *ff.*). Two of these suits were actions brought by the Union under Section 301 of the Act to compel Deaton to arbitrate grievances. *International Brotherhood of Teamsters, etc., Local 612* v. *Deaton Truck Lines, Inc.*, 307 F. 2d 748 (C.A. 5); *Deaton Truck Lines, Inc.* v. *Local 612, etc.* (No. 19688), 314 F. 2d 418 (C.A. 5). The third case, *Deaton Truck Lines, Inc.* v. *Local Union No. 612* (No. 10135–S, N.D. Ala.) was brought by the Company to obtain a declaratory judgment that a union assessment and dues checkoff were unlawful because the owner-drivers were not employees under the Act.

[3] Deaton conceded that the individuals who drove the three trucks which it owned were its employees. As to the leased trucks, however, the Company contended that the owner-drivers were independent contractors, and that the other drivers were employees of the lessors of the trucks. The Union made no claim to represent non-driver owners. (Pet. 9c.)

judicial proceedings where that question was then in issue.[4] (Pet. 4b; J.A. 28). The Union rejected this suggestion, insisting that Deaton bargain with it as the representative of all Deaton drivers (J.A. 29–30, 251).

On July 19, 1962, Deaton sent a notice of cancellation of existing leases to its owner-drivers. Enclosed were new leases which specified that the status of the owner-driver was that of an independent contractor (Pet. 5b; D.A. 150–160). A week later, Deaton and the Union entered into a "truce agreement" which continued in effect the terms and conditions of the last contract (Pet. 5b; D.A. 116–118).

The Union then filed unfair labor practice charges with the Board, charging that Deaton had violated Sections 8(a) (5) and (1) of the Act by failing to bargain with the Union on behalf of "all road drivers in the Deaton operation" (R. 11). A complaint was issued (R. 14–18). The Board, after hearing, found that Deaton had not violated the Act and dismissed the complaint. The Board rejected Deaton's contention that the owner-drivers were independent contractors and found instead that "the relationship between the Company and all drivers of its fleet is one of employment" (Pet. 10b–11b). The Board further found, however, that the multiple-owner-drivers were supervisory employees within the mean-

[4] See note 2, *supra*. Both the 1957 and 1959 contracts provided that all "Mechanics, Helpers, Drivers, Driver Owners, etc." would become members of the Union after 30 days' employment, but did not specifically set forth a unit description (Pet. 2b).

ing of Section 2(11) of the Act,[5] and that the Union's bargaining demand included the multiple-owner-drivers. The Union had thus sought recognition in an inappropriate unit. In these circumstances, the Board concluded that Deaton was warranted in refusing the Union's demand. (Pet. 11b.)

The court of appeals sustained the Board's dismissal of the complaint against Deaton. The court concluded that the evidence supported the Board's finding that the multiple-owner-drivers were supervisory employees of Deaton, and that the Board had properly determined that Deaton was under no duty to bargain for a unit including them (Pet. 1a–5a).

ARGUMENT

1. Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain

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[5] The record shows that the multiple-owner-drivers have substantial authority to determine the drivers who are to operate their trucks. Deaton determines those applicants for employment who are qualified to drive in its fleet. A non-owner applicant who is found to be qualified becomes a member of the Company's reserve pool of qualified drivers (Pet. 11b; J.A. 102–103, 125–127). However, the multiple-owner-driver may choose from this pool any driver he prefers for his trucks (Pet. 11b; J.A. 126–127).

In addition, a multiple-owner-driver has discretion to transfer drivers from one truck to another—and such transfers have a direct effect on the driver's earnings (Pet. 11b; D.A. 60, 61, 96–97). The multiple-owner-driver also possesses power to remove permanently from one of his trucks any driver he finds objectionable. Although such removal does not disqualify the employee as a Company driver, he must be chosen by another multiple-owner-driver before he can drive again in the Company fleet (D.A. 67, D.A. (Vol. III) 109, D.A. (Vol. IV) 127).

collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes,* shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *" (emphasis added). Accordingly, a prerequisite to invoking the bargaining obligation imposed by Section 8(a)(5) is that a demand be made with respect to an appropriate bargaining unit. See *National Labor Relations Board* v. *Columbian Enameling and Stamping Co.,* 306 U.S. 292. Since supervisory employees are exempt from the coverage of the Act and an employer is under no obligation to bargain with a union over the terms and conditions of their employment, a bargaining unit which includes such employees would not ordinarily be appropriate. An employer would thus be justified in declining a request to bargain with respect to that kind of a unit. Petitioner does not challenge that settled rule. The only question in this case is whether the Board should not have applied the principle here because the supervisory employees in the unit (the multiple-owner-drivers) comprised only a minority of the employees in the unit (about 20 out of a total of 260 drivers) (Pet. 9–11). So narrow an issue, which turns on the facts of the particular case, does not warrant review by this Court.

Furthermore, the Board's conclusion was wholly reasonable. Unlike the cases cited in the petition

(p. 10),[6] where the variance between the unit requested and the one ultimately found to be appropriate was unrelated to the employer's refusal to bargain, here the status of Deaton's drivers and the question of whether they were entitled to representation rights had been a major issue in the negotiations. It was the Union's insistence that they were all employees and Deaton's unwillingness to concede that point which caused negotiations to founder. In these circumstances, when the Board found that the unit demanded by the Union did in fact contain twenty drivers who were not employees within the meaning of the Act, it was reasonable for the Board to treat the variance as both substantial and relevant and to conclude that Deaton did not violate Section 8(a)(5) of the Act by refusing to bargain with respect to that unit. See *Alabama Marble Co.*, 83 NLRB 1047, 1070; *Page Aircraft Maintenance, Inc.*, 123 NLRB 159, 164; *Quality Food Markets, Inc.*, 126 NLRB 349, 351.

Petitioner is not aided by *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, and the explication of that decision set forth in *United States* v. *Drum*, 368 U.S. 370, 382–383, n. 26 (Pet. 7–9). *Oliver* holds that the "contracting out" of work being performed by employees in the bargaining unit can undermine the standards established for those employees; therefore, they have a legitimate interest in bargaining about the subject and in attempting to limit the con-

[6] *Brewery and Beverage Drivers, Local 67* v. *National Labor Relations Board*, 257 F. 2d 194 (C.A.D.C.); *Bethlehem Steel Co. (Shipbuilding Div.)* v. *National Labor Relations Board*, 320 F. 2d 615 (C.A. 3), certiorari denied, 375 U.S. 984.

ditions under which contracting out will occur. See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203. The Union here did not confine itself to bargaining about the conditions under which work of the bargaining unit would be contracted out; rather, it insisted on obtaining recognition for, and bargaining on behalf of, individuals (the multiple-owner-drivers) who were not employees within the meaning of the Act (see, *e.g.,* J.A. 251). Nothing in *Oliver* permits such a demand. Cf. *National Labor Relations Board* v. *Retail Clerks,* 203 F. 2d 165, 211 F. 2d 759 (C.A. 9), certiorari denied, 348 U.S. 839.

2. The Union's challenge to the Board's finding that the multiple-owner-drivers have the status of supervisors (Pet. 11–13) raises a second factual issue which does not warrant review by this Court after full review by the court of appeals. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. Moreover, the record amply supports the Board's finding that the multiple-owner-drivers, through their control over who is to drive Deaton trucks, exercise supervisory authority (see note 5, *supra*). The Union's contention that the multiple-owner-drivers exercise their supervisory authority exclusively in their own interests rather than in the interest of Deaton, as Section 2(11) requires, is erroneous. As the court of appeals noted (Pet. 5a): "All drivers handle cargo exclusively for Deaton, in trucks bearing Deaton's name. Granted that the supervisory authority is to be exercised in the interest

of the multiple owner, such interest is so intertwined with the interest of Deaton in the successful and efficient operation of the trucks that it cannot be denied in most instances of actual execution the supervisory authority is in the interest of both Deaton and of the multiple owner."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

DAVID PREVIANT
511 Warner Theatre Building
Milwaukee, Wisconsin

L. N. D. WELLS, JR.
1601 National Bankers Life Building
Dallas, Texas 75201
Counsel for Petitioner

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8365

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1.

We do *not* present "so narrow an issue, which turns on the facts of the particular case" as Respondent asserts at Opposition page 7. Rather, we challenge what Respondent's attorneys assert is the "settled rule" that a bargaining request for a unit which includes some employees later found to be supervisors relieves the employer of the duty to bargain.

Respondent's attorneys cite no authority for the assertedly "settled rule", Opp[illegible]ion p. 7.[1] There could be none. For by §14(a) of the Act the inclusion of supervisors in a bargaining unit is permissive. True, an employer may not be compelled to bargain for supervisors, but such bargaining is permissive under §14(a), which specifically envisages supervisors becoming and remaining members of a labor organization.[2] The Congress was at pains to permit their inclusion in bargaining units.[3]

To hold that the mere proposal of that which the Act permits obliterates the duty to bargain, is as the District of Columbia Circuit has held, "arbitrary." *Brewery Workers v. NLRB,* 103 App. D.C. 190, 257 F.2d 194 (C.A. D.C., 1958).

2.

Respondent's attorneys twist the facts at Opposition page 8. There they imply that the status of twenty (of the more than 260) drivers "had been a major issue in the negotiations." Actually neither

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[1] The Board cases cited at Opposition p. 8 do not involve supervisors. *Alabama Marble,* 83 NLRB 1047, 1070 involves "guards", specifically treated in §9 of the Act. *Page Aircraft,* 123 NLRB 159, 164 deals with attempts to include plant clericals contrary to bargaining history, and Board precedent; *Quality Food,* 129 NLRB 349, 351 merely holds that two stores of a chain, separately managed cannot be regarded as a single or integrated operation.

[2] Section 14(a) provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organizing nor does it prohibit any employer from recognizing a union of individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[3] The Senate Report noted: ". . . the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen."

employer nor union ever raised the point. Both employer and union agreed that these drivers were *not* supervisors. Deaton's brief to the Court of Appeals flatly stated: "We believe that the Board's finding that the multiple owner-drivers are Deaton's supervisors cannot stand." See Petition pp. 12-13.

The only issue as to the status of *any* drivers was whether all were "employees" as union asserted, or "independent contractors" as Deaton asserted.

The Board found "that the drivers, including owner-drivers and multiple owner-drivers, *are employees of Deaton.*" See text of Board Decision at ftnt 7, Petition, Appendix B, at p. 10b, emphasis added.

True, the Board more than a year later noted that the multiple owner-drivers possess the power substantially to effect the hire and discharge of the drivers of their other leased trucks (Board Decision at Petition App. B, p. 11b). But the fact remains that the issue of the status of these drivers as "supervisors" was never raised in the negotiations between the parties. It certainly was never "a major issue in the negotiations" as Respondent's attorneys suggest.

3.

As the Opposition states (p-9) there was a Board finding that the multiple-owner-drivers exercise supervisory authority.

But the Board made no finding as to whether this authority was exercised *in the interest of the*

employer Deaton — an essential to establishing status as "supervisor" within the meaning of the definition in Act §2(11), 29 USC §152(11).

This deficiency was drawn to the Board's attention; the Board first issued a show cause order indicating that it intended further hearing and further decision on the issue (R. 110-112). Then "having duly considered the matter, but being unable to arrive at a majority" (R. 152) the Board failed to determine whether the authority was exercised in the interest of Deaton.

The Opposition attempts to supply by argument of counsel (pp. 9-10) the essential finding as to which the Board was unable to find a majority. We respectfully insist that it is the Board's order—and its propriety or deficiency—which is here to be tested, not the speculation of counsel as to a finding which the Board did not make. See *NLRB v. Metropolitan Life Ins. Co.* .....U.S. ....., 58 LRRM 2721 at 2723 (April, 1965).

Wherefore, certiorari should be granted.

Respectfully,

DAVID PREVIANT
511 Warner Theatre Bldg.
Milwaukee 3, Wisconsin

L. N. D. WELLS, JR.
1601 National Bankers Life Bldg.
Dallas, Texas 75201

Counsel for Petitioner